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MOTRICITY, INC.

E-filing

FILED

MAR 25 2009

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CAMELLIA WALKER, individually and
on behalf of a class of similarly situated
individuals,

Plaintiff,

v.

MOTRICITY, INC., a Delaware
corporation,

Defendant.

CASE NO.

09

1316

MOTRICITY, INC.'S NOTICE OF
REMOVAL

Defendant, Motricity, Inc. ("Motricity"), pursuant to 28 U.S.C. §§ 1441, 1446, and 1453,
hereby gives notice of the removal of the above-captioned action from the Superior Court of the
State of California for the County of Alameda to the United States District Court for the Northern
District of California and states:

I. INTRODUCTION

1. On July 3, 2008, Plaintiff, individually and on behalf of all other wireless
telephone subscribers similarly situated in California, filed an action in the Superior Court of the
State of California for the County of Alameda captioned Walker v. Motricity, Inc., Case No. 08-
396630. Copies of the Summons and Complaint served on Motricity are attached as Exhibit A.

2. This action is a civil action of which this Court has original jurisdiction under 28
U.S.C. § 1332, and is one which may be removed to this Court by Motricity pursuant to the

provisions of 28 U.S.C. 1441 and 1453.

3. This case is properly removed to this Court pursuant to 28 U.S.C. § 1441 because Motricity has satisfied the procedural requirements for removal set forth in 28 U.S.C. § 1446(b), and this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1332(d) and 1453.¹

4. Pursuant to 28 U.S.C. § 1446(b), "a notice of removal can be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of . . . other paper from which it may first be ascertained that the case is one which is or has become removable." On February 24, 2009, counsel for Motricity received documentation from which Motricity could determine that Plaintiff seeks in excess of \$5,000,000 in damages and restitution in this action thus satisfying CAFA's amount in controversy requirement.² This Notice of Removal is being filed within thirty days of February 24, 2009.

5. **Intradistrict Assignment:** This action arose in Alameda County, which is within the San Francisco Division of the United States District Court for the Northern District of California. Therefore, assignment of this action to the San Francisco division is appropriate.

II. JURISDICTION PURSUANT TO CLASS ACTION FAIRNESS ACT

6. This case is subject to removal pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332, 1453 ("CAFA"). CAFA grants federal courts jurisdictions over class actions in which: (1) the aggregate number of proposed plaintiffs is 100 or greater; (2) any member of the plaintiff class is a citizen of a different state than the defendant thus establishing the required minimal diversity; (3) the primary defendants are not States, State officials, or other governmental

¹ This action was previously removed by Motricity on July 30, 2008 pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332, 1453 ("CAFA"). On March 11, 2009, the Court granted Plaintiff's Motion to Remand holding that Motricity's evidence regarding its cost of complying with Plaintiff's request for injunctive relief did not prove CAFA's \$5,000,000 amount in controversy requirement. Because Motricity seeks to remove this action based on new and previously unknown grounds, removal is proper. See Kirkbride v. Continental Casualty Co., 933 F.2d 729, 732 (9th Cir. 1991) (upholding successive removal on new and previously unavailable grounds); Mattel, Inc. v. Bryant, 441 F.Supp.2d 1081 (C.D. Cal. 2005) (upholding second removal based on new evidence proving amount in controversy).

² Motricity's counsel received this evidence after the Motion to Remand had been fully briefed, argued, and was pending.

1 entities; and (4) the aggregate amount-in-controversy exceeds \$5,000,000. 28 U.S.C. §
2 1332(d)(2)(A), (d)(5)(A) - (B), and (d)(6).

3 7. This action satisfies each of the jurisdictional requirements of Section 1332(d). As
4 a result, this Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §
5 1332(d).

6 **A. This Action is a Class Action Consisting of More Than 100 Members.**

7 8. In the Complaint, Plaintiff claims to represent a class of "all wireless telephone
8 subscribers in California who suffered losses or damages as a result of incurring charges on their
9 cellular telephone bills from or on behalf of Motricity not authorized by the subscriber . . ."
10 Compl., ¶ 34. Plaintiff claims that the putative class consists of "thousands of individuals and
11 other entities, making joinder impractical . . ." Compl., ¶ 35. Based on these allegations, the
12 aggregate number of class members in the class that Plaintiff purports to represent is greater than
13 100 and thus satisfies 28 U.S.C. § 1332(d)(5)(B).

14 **B. Plaintiff is a Citizen of a Different State Than Motricity.**

15 9. Plaintiff is a citizen of the State of California. Compl., ¶ 1. Motricity is, and was
16 at the time Plaintiff commenced this action, a Delaware corporation with its principal place of
17 business in the State of Washington. Compl., ¶ 2. The minimal diversity required by CAFA is
18 met because Plaintiff and Motricity are citizens of different states. See 28 U.S.C. §
19 1332(d)(2)(A).

20 **C. Motricity is Not a State, State Official, or Other Governmental Entity.**

21 10. As stated above, Motricity is a private corporation and thus 28 U.S.C. §
22 1332(d)(5)(A) is met.

23 **D. The Amount in Controversy Exceeds \$5,000,000.**

24 11. Under CAFA, the claims of the individual class members are aggregated to
25 determine if the amount in controversy exceeds the required "sum or value of \$5,000,000,
26 exclusive of interest and costs." 28 U.S.C. § 1332(d)(2), (d)(6). Without conceding any merit to
27 the Complaint's allegations or causes of action, the \$5,000,000 amount in controversy has been
28 met.

1 **Compensatory Damages**

2 12. Although the Complaint does not state an amount in controversy, it does seek
3 economic, monetary, actual, consequential, and compensatory damages, on behalf of a class of all
4 wireless telephone subscribers in California, for Motricity's alleged practice of billing customers
5 for unauthorized mobile content. Compl., ¶ 34, Prayer for Relief, ¶ C. While Motricity disputes
6 and denies that it is liable to Plaintiff or the putative class and denies that any such class could be
7 properly certified pursuant to Federal Rule of Civil Procedure 23, based upon the allegations of
8 the Complaint and the sworn statements of Plaintiff's counsel, at least \$3,000,000 of the
9 \$5,000,000 amount in controversy requirement has been met.

10 13. Motricity has generated in excess of \$15,000,000 in revenue related to premium
11 mobile content from wireless subscribers in California. See Declaration of Steve Leonard
12 (hereafter "Leonard Declaration"), ¶ 5. A copy of the Leonard Declaration is attached hereto as
13 **Exhibit B.**

14 14. On February 24, 2009, Motricity received for the first time documents in which it
15 learned that Jay Edelson, managing partner of KamberEdelson, LLC, Class Counsel for Plaintiff,
16 in the companion action styled Denee VanDyke and Ben Walker, individually and on behalf of a
17 class of similarly situated individuals v. Media Breakaway, LLC, United States District Court,
18 Southern District of Florida, Case No. 08-CV-22131, submitted his declaration in support of a
19 Motion for Preliminary Approval of Class Action Settlement stating:

20 11. Based upon information that Class Counsel has collected in this
21 and the Related Action, and from experts, governmental agencies,
22 and in litigation involving the aggregators and wireless carriers,
 Class Counsel estimates that approximately 20% of all mobile
 content charges are unauthorized. . . .

23 Declaration of Jay Edelson (hereafter "Edelson Declaration"), ¶ 11. A copy of the Edelson
24 Declaration is attached hereto as **Exhibit C.** This was Motricity's first notice of this information.

25 15. Class Counsel's statement that 20% of all mobile content charges are unauthorized
26 was, by its terms, a generalization across the wireless industry. Because the instant litigation
27 involves alleged unauthorized billing by Motricity, an aggregator, and this is the same type of
28 litigation from which Class Counsel generated the 20% figure, Class Counsel's statement applies

1 to this case with equal force as it did in VanDyke.

2 16. Further, Class Counsel represents that his firm and its predecessor have been
3 involved in a wide-ranging investigation into the mobile content industry since 2005 and that
4 consumers have filed numerous lawsuits across the country against all major wireless carriers
5 (e.g., AT&T, Sprint & T-Mobile), aggregators and mobile content providers. Ex. C, Edelson
6 Declaration, ¶¶ 3 and 4.

7 17. Class Counsel also states that these “numerous pending class actions involving
8 alleged unauthorized charges” have allowed the parties to develop legal and factual theories that
9 have been tested through motion practice. Ex. C, Edelson Declaration, ¶ 15.

10 18. Class Counsel’s firm resume,³ in the section titled “Plaintiff’s Class and Mass
11 Action Practice Group,” states, “We have prosecuted over 100 cases involving mobile content,
12 settling numerous nationwide class actions, including against industry leader AT&T Mobility . . .
13 .” Ex. C, Edelson Declaration, Ex. B-1.

14 19. The “Representative Settlements” section for the “Plaintiff’s Class and Mass
15 Action Practice Group” lists a number of cases, in which, similar to this case, Class Counsel
16 represented wireless subscribers alleging that unauthorized charges had been placed on their cell
17 phone bills. Among those cases are the following:

18 McFerren v. AT&T Mobility, LLC, No. 08-CV-151322 (Fulton
19 County Sup. Ct., GA): Lead counsel in class action settlement
20 involving 16 related cases against largest wireless service provider
21 in the nation. Settlement provided virtually full refunds to a
nationwide class of consumers who alleged that unauthorized
charges for mobile content were place on their cell phone bills.

22 Gray v. Mobile Messenger Americas, Inc., No. 08-CV-61089 (S.D.
23 Fla.): Lead counsel in case alleging unauthorized charges were
placed on cell phone bills. Case settled for \$12,000,000.

24 *Gresham v. Cellco Partnership*, No. BC 387729 (Los Angeles Sup.
25 Ct.): Lead counsel in case ***alleging unauthorized charges were
placed on cell phone bills***. Settlement provided class members with
full refunds.

26 *Duffy v. Nevis Mobile, LLC*, No. 08 CH 21376 (Cir. Ct. Cook
27 County, IL): Class counsel in certified class action against mobile

28 ³ This resume was attached as an exhibit to the Edelson Declaration.

content provider for *unauthorized mobile content charges* resulting in default judgment over \$10,000,000.

Ex. C, Edelson Declaration, Ex. B-1 (emphasis added).

20. Class Counsel's role in representing other plaintiff classes alleging unauthorized billing for mobile content along with Edelson's own statements indicate that Class Counsel views this purported class action as part of a mega class action that Class Counsel is prosecuting against wireless carriers, content providers, and aggregators in multiple jurisdictions. Because Class Counsel's own representations indicate that the facts and theories in one such case are tested and applicable in the other cases, the representations in the Edelson Declaration apply to this case.

21. Finally, the Edelson Declaration is applicable because VanDyke is virtually identical to this case as evidenced by the following:

- a. The VanDyke class brought a lawsuit against Alltel Communications, LLC, and Media Breakaway, LLC, who, like Motricity, are involved in the delivery of mobile content to wireless devices.
- b. The VanDyke Complaint, just as the complaint in this case, alleges that the defendants engaged in an improper billing scheme whereby the purported plaintiff class was charged for unauthorized mobile content. VanDyke v. Alltel Communications and Media Breakaway, LLC, ¶¶ 6-21. A copy of the VanDyke Complaint is attached hereto as **Exhibit D**. In fact, twelve (12) paragraphs of the Plaintiff's Complaint in this case describing the allegedly improper billing scheme are virtually identical to paragraphs of the VanDyke Complaint. Compare Compl., Ex. A, ¶¶ 6-13, 19-20, 22-25 with VanDyke Compl., ¶¶ 6-8, 10-16, 18-21.
- c. Both complaints allege that the classes are those "wireless telephone subscribers" who suffered losses or damages as a result of the defendants' alleged billing for "mobile content products and services not authorized by the subscriber." Compare Compl., Ex. A, ¶ 34 with VanDyke Compl., ¶¶ 43(A) & (B).
- d. Both complaints allege causes of action for Restitution/Unjust Enrichment and Tortious Interference with a Contract. Compare Compl., Ex. A, ¶¶ 42-51 with VanDyke Compl., ¶¶ 60-68.
- e. Both complaints broadly request injunctive relief necessary to protect the interests of the plaintiff and the class. Compare Compl., Ex. A, ¶ 56, 61, 67, Prayer for Relief, ¶ H with VanDyke Compl., Prayer for Relief, ¶ H.
- f. Neither class specifies a class period.

22. Because VanDyke is almost identical in its factual allegations, class allegations, and causes of action to this action, and because the Edelson Declaration, by its terms, declares that it is applicable in other similar matters, the Court should consider the admission in the Edelson Declaration as applicable and relevant to the amount in controversy in this matter.

23. Because Motricity has generated in excess of \$15,000,000 in revenue related to

1 premium mobile content from wireless customers in California — and because Plaintiff's counsel
2 have asserted that 20% of all mobile content charges are unauthorized — at least \$3,000,000 of
3 the \$5,000,000 threshold is met.

4 24. Further, asserting this Court's CAFA jurisdiction is consistent with the VanDyke
5 v. Media Breakaway, LLC case mentioned above. In that case Class Counsel states that he
6 "believes the **\$5.75 million settlement** cap [set in that case's Stipulation of Settlement]
7 approximates the full amount of the unauthorized charges attributable to Media Breakaway."⁴
8 Ex. C, Edelson Declaration, ¶ 12 (emphasis supplied). Since Van Dyke similarly involves a class
9 action alleging liability for "cramming" and asserting similar causes of action, this Court can
10 consider VanDyke's proposed settlement cap as probative of the amount in controversy. See
11 Kroske v. U.S. Bank Corp., 432 F.3d 976, 980 (9th Cir. 2005) (court can consider damage awards
12 in similar cases in determining whether amount in controversy is met).

13 25. Pursuant to 28 U.S.C. § 1446(b), "a notice of removal can be filed within thirty
14 days after receipt by the defendant, through service or otherwise, of a copy of an . . . other paper
15 from which it may first be ascertained that the case is one which is or has become removable."

16 26. On February 24, 2009 Motricity's counsel received the Edelson Declaration in an
17 e-mail from counsel in a related matter. Such a communication between counsel qualifies as
18 "other paper" from which removability may be ascertained. See e.g., Wright and Miller, Federal
19 Practice and Procedure, § 3732 ("The federal courts have given the reference to 'other paper' an
20 embrative construction and have included a wide array of documents within its scope . . . [and]
21 correspondence between the parties and their attorneys or between the attorneys usually are
22 accepted as 'other paper' sources that initiate a new thirty-day period of removability.");
23 Broderick v. Dellasandro, 859 F. Supp. 176 (E.D. Pa. 1994); Sunburst Bank v. Summit
24 Acceptance Corp., 878 F. Supp. 77 (S.D. Miss. 1995); Central Iowa Agri-Systems v. Old
25 Heritage Advertising and Publishers, Inc., 727 F. Supp. 1304 (S.D. Iowa 1989). See also Cohn v.
26 Petsmart, Inc., 281 F.3d 837, 840 (9th Cir. 2002) (settlement letter sufficient to establish amount

27
28 ⁴ According to Mr. Edelson, Media Breakaway is a content provider. Ex. C, Edelson Declaration, ¶ 4.

1 in controversy); Baxter v. Nat'l Safety Council, No. C05-0752C, 2005 WL 2219369 (W.D. Wash.
2 Sept. 13, 2005) (post-removal receipt of settlement letter proved amount in controversy).

3 27. For the Court's convenience, Motricity attaches the prior state court notice of
4 removal and its attachments as Exhibit E.

5 Restitution

6 28. Plaintiff seeks restitution of all money which Motricity has allegedly received
7 unjustly from Plaintiff and the purported class as a result of Motricity's billing practices. Compl.,
8 ¶¶ 43-46, 56, 61, 67. Plaintiff later asserts that the amounts Motricity allegedly owes Plaintiff and
9 the other members of the purported class can be ascertained through an accounting. Compl., ¶ 70.

10 29. Because Motricity has received in excess of \$15,000,000 in revenue related to
11 premium mobile content from wireless customers nationwide, if Motricity is required to make
12 restitution for 20% of all such charges, the percentage of alleged unauthorized charges, at least
13 \$3,000,000 of the \$5,000,000 threshold is met.

14 Punitive Damages

15 30. Plaintiff's request for "exemplary damages", Compl., Prayer for Relief ¶ C,
16 demonstrates that the remainder of the \$5,000,000 threshold is met. Punitive and exemplary
17 damages are considered part of the amount in controversy. See e.g., Gibson v. Chrysler Corp.,
18 261 F.3d 927, 945 (9th Cir. 2001). Courts have held that, in determining the amount of punitive
19 damages for the amount in controversy calculation, it is appropriate to apply a two to three time
20 multiplier to a Plaintiff's actual damages. See e.g., Buller v. Owner Operator Independent Driver
21 Risk Retention Group, Inc., 461 F.Supp.2d 757, 763 (S.D. Ill. 2006) ("constitutionally-
22 permissible award of punitive damages in a ratio of two or three times" the class's aggregate
23 actual damages allowed court to conclude that \$5,000,000 amount in controversy met when
24 considered alongside claim for actual damages).

25 31. Although Motricity denies that Plaintiff or the putative class is entitled to recover
26 punitive or exemplary damages, even a one time multiplier of the \$3,000,000 actual damages
27 figure would result in at least \$3,000,000 in punitive damages. Therefore, it is appropriate for
28 this court to hold that the amount of punitive damages in controversy brings the total amount in

1 controversy to well in excess of \$5,000,000.

2 **Attorneys' Fees and Expenses**

3 32. On behalf of the purported class, Plaintiff also seeks an award of court costs and
 4 attorneys' fees under the California Consumer Legal Remedies Act, under the California Unfair
 5 Competition Law, and the California Computer Crime Law. Compl. ¶¶ 56, 61, 67, Prayer for
 6 Relief, ¶ D. Although Motricity denies that Plaintiff or the putative class is entitled to recover
 7 attorneys' fees and costs, because Plaintiff seeks attorney's fees pursuant to statutes which allow
 8 for such fees, this Court should include this amount in the amount in controversy calculation. See
 9 Brady v. Mercedes Benz, 243 F.Supp.2d 1004, 1010-1011 (N.D. Cal. 2002) (can consider
 10 prospective attorneys' fees as allowed by law in determining amount in controversy).
 11 Specifically, the Court should consider Class Counsel's fees in VanDyke, where the parties have
 12 agreed that Class Counsel's fee award will be as much as \$2,300,000, as probative of the likely
 13 amount of prospective attorneys' fees in this case. Edelson Declaration, ¶ 10; Beaver v. NPC
 14 International, Inc., 451 F.Supp.2d 1196, 1198 (D. Or. 2006) (attorneys' fees awards in similar
 15 cases are probative of amount in controversy).

16 33. Because the percentage of unauthorized charges asserted by Class Counsel
 17 considered along with the nature and extent of Motricity's business demonstrates that Plaintiff
 18 seeks more than \$3,000,000 in actual damages and restitution and because it is appropriate for the
 19 court to multiply that amount by a two or three time multiplier to determine the amount of
 20 punitive and exemplary damages in controversy, the amount in controversy is far above
 21 \$5,000,000 and the CAFA amount in controversy requirement is met on damages/restitution
 22 alone.

23 34. Further, the Court should also consider that Class Counsel for Plaintiff has sought
 24 more than \$5,000,000 in damages and restitution in similar actions and attorneys' fees in excess
 25 of \$2,000,000 in holding that the CAFA amount in controversy requirement is exceeded.

26 35. In summary, all of CAFA's jurisdictional requirements are satisfied. As a result,
 27 this Court has subject matter jurisdiction over this action.

1 **III. PROCEDURAL STATEMENT**

2 36. Because Motricity received the new evidence related to the extent of Plaintiff's
3 alleged damages and restitution on February 24, 2009, this Notice of Removal has been timely
4 filed within thirty (30) days pursuant to 28 U.S.C. § 1446(b).

5 37. Pursuant to 28 U.S.C. § 1441(a), removal to the United States District Court for
6 the Northern District of California is proper because the Superior Court of the State of California,
7 Alameda County is located within this District.

8 38. Pursuant to 28 U.S.C. § 1446(a), Motricity will promptly provide notice of this
9 Notice of Removal to the Superior Court of the State of California, Alameda County.

10 39. This Notice of Removal has been served upon all parties pursuant to 28 U.S.C. §
11 1446(d).


12 40. By removing this action to this Court, Motricity does not waive any defenses,
13 objections or motions available to it under state and federal law.

14 Wherefore, pursuant to 28 U.S.C. §§ 1441, 1446, and 1453, Defendant Motricity, Inc.,
15 hereby removes the above-captioned civil action from the Superior Court of the State of
16 California, Alameda County.

17 Dated: March 25, 2009

Respectfully submitted,

DLA PIPER LLP (US)

20 By 
21 DAVID F. GROSS
22 STEPHEN CHIARI
23 Attorneys for Defendant
24 MOTRICITY, INC.

SUMMONS
(CITACION JUDICIAL)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

MOTRICITY, INC., a Delaware corporation,

YOU ARE BEING SUED BY PLAINTIFF:

(LO ESTÁ DEMANDANDO EL DEMANDANTE):

CAMELLIA WALKER, individually and on behalf of a class of similarly situated individuals,

FILED
FOR JUDICIAL USE ONLY
ALAMEDA COUNTY
2008 JUL -3 PM 2:51
CLERK OF THE SUPERIOR COURT
by Dorothy Lee
DEPUTY

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (www.lawhelpcalifornia.org), the California Courts Online Self-Help Center (www.courtinfo.ca.gov/selfhelp), or by contacting your local court or county bar association.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California (www.courtinfo.ca.gov/selfhelp/espanol) o poniéndose en contacto con la corte o el colegio de abogados locales.

The name and address of the court is:
(El nombre y dirección de la corte es):

René C. Davidson Alameda County Courthouse
1225 Fallon St., Oakland, CA, 94612

CASE NUMBER:
(Número de Caso) **PC 08 386630**

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:

(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):

Alan Ilimmelfarb. KAMBEREDELSON LLC,
2757 Leonis Blvd., Los Angeles, CA 90058, (323) 585-8696

DATE:
(Fecha) **JUL 03 2008**

PAT S. SWETEN

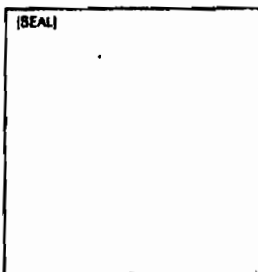
Clerk, by
(Secretario)

Dorothy L. Lee

Deputy
(Adjunto)

(For proof of service of this summons, use Proof of Service of Summons (form POS-010).)

(Para prueba de entrega de esta citación use el formulario Proof of Service of Summons, (POS-010)).



NOTICE TO THE PERSON SERVED: You are served

1. ☐ as an individual defendant.
2. ☐ as the person sued under the fictitious name of (specify):
3. ☐ on behalf of (specify):

under: <input type="checkbox"/> CCP 416.10 (corporation)	<input type="checkbox"/> CCP 416.80 (minor)
<input type="checkbox"/> CCP 416.20 (defunct corporation)	<input type="checkbox"/> CCP 416.70 (conservatee)
<input type="checkbox"/> CCP 416.40 (association or partnership)	<input type="checkbox"/> CCP 416.90 (authorized person)
<input type="checkbox"/> other (specify):	
4. ☐ by personal delivery on (date):

Sumed 7 108



FILED
ALAMEDA COUNTY

2008 JUL -3 PM 2: 52

CLERK OF THE SUPERIOR COURT

BY H. H. Lee
DEPUTY

ALAN HIMMELFARB - SBN 90480
KAMBEREDELSON, LLC
2757 Leonis Boulevard
Vernon, California 90058
Telephone: (323) 585-8696

Attorneys For Plaintiff

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CAMELLIA WALKER, individually and
on behalf of a class of similarly situated
individuals,

Plaintiff,

v.

MOTRICITY, INC., a Delaware
corporation,

Defendant.

Case No. RG 08 - 396630
) COMPLAINT FOR DAMAGES AND
) INJUNCTIVE RELIEF
) RESTITUTION/UNJUST
) ENRICHMENT; TORTIOUS
) INTERFERENCE WITH A
) CONTRACT; UNLAWFUL, UNFAIR
) AND DECEPTIVE BUSINESS
) PRACTICES (CAL. BUS. & PROF.
) CODE §17200, et seq.)
) DEMAND FOR JURY TRIAL
) CLASS ACTION

BY FAX**CLASS ACTION COMPLAINT**

Plaintiff Camellia Walker brings this class action complaint against Defendant Motricity, Inc. ("Motricity"), seeking to stop Defendant's unlawful practice of charging cellular telephone customers for products and services the customers have not authorized, a practice which has resulted in Defendant unlawfully collecting thousands of dollars from consumers statewide, and to obtain redress for all persons injured by its conduct. Plaintiff, for her class action complaint, alleges as follows upon personal knowledge as to herself and her own acts and experiences, and, as to all other matters, upon information and belief, including investigation conducted by her attorneys.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

PARTIES

1. Plaintiff Palma Walker is a resident of Alameda County, California.

2. Defendant Motricity, Inc. ("Motricity") is an "aggregator" and operates a mobile transaction network that processes mobile payments and related transmissions on its behalf and on behalf of carriers, other aggregators and third party mobile content providers, including various subsidiaries through which it operates. Motricity is a Delaware corporation with its headquarters and principal place of business in the State of Washington. Motricity does business throughout the State of California and this county.

JURISDICTION

3. This Court has jurisdiction over the causes of action asserted herein pursuant to the California Constitution, Article VI, §10, because this case is a cause not given by statute to other trial courts.

4. This Court has jurisdiction over Defendant pursuant to Code of Civil Procedure section § 410.10 because Defendant conducts business in the State of California and/or many of Defendant's wrongful acts arose or emanated from California.

VENUE

5. Venue is proper in this Court pursuant to Code of Civil Procedure because Plaintiff resides in Alameda County.

CONDUCT COMPLAINED OF

6. This case arises from two closely related phenomena. The first is the capability of most cellular telephones, not only to make and receive telephone calls, but also to send and receive text messages, including -- most significantly for present purposes -- "premium" text message services. These services, also known as "mobile content" include products that range from the basic (customized ringtones for use with cell phones, sports score reports, weather alerts, stock tips, horoscope services, and the like) to those requiring

1 more advanced capabilities (such as direct payment services, interactive radio and
2 participatory television).

3 7. The second underlying phenomenon of this case constitutes its very core.
4 That is, just as providers of premium mobile content deliver their products by means of cell
5 phone technology, they likewise charge and collect from their customers by "piggybacking"
6 on the cell phone bills sent out by the wireless carriers. Further, because the mobile content
7 providers by themselves most often lack the wherewithal to negotiate the necessary
8 relationships with the much larger wireless carriers, they do so with the help of third-party
9 companies, such as Motricity, known as aggregators. These aggregators act as middle-men,
10 representing numerous mobile content providers in arriving at the agreements that allow
11 them to use the billing and collection mechanisms of the wireless carriers. In turn, both the
12 aggregators and the wireless carriers are compensated for their services to the mobile content
13 providers by retaining a substantial percentage of the amount each premium mobile content
14 transaction.

15 8. The rapid and largely unplanned growth of the premium mobile content
16 industry has led both to the above-described structure and to a disastrous flaw within it. That
17 flaw -- understood, perpetuated, and even encouraged by carriers, aggregators, and mobile
18 content providers such as the instant defendants -- is an open secret within the industry, but
19 little understood outside of it. In short, the billing and collection systems established by
20 companies including Defendant in aid of the premium mobile content industry that enriches
21 them are conspicuously free of any checks or safeguards to prevent erroneous and
22 unauthorized charges from being added to customers' bills.

23 9. As Defendant also knows, thousands of dollars have been collected on
24 account of such unauthorized charges for premium mobile content in the industry over the
25 last few years. And while it has always been within the power of companies such as
26 Defendant to institute simple and effective measures that would prevent this, they have
27

1 instead knowingly maintained the very system that has allowed these erroneous charges.

2 Indeed, Defendant has reaped and retained its respective shares of the improper collections.

3 10. While the total sales in California of premium mobile content in 2007 amount
4 to a multimillion dollar sum, the business is still in its infancy. The burgeoning industry has
5 already expanded from ordinary ringtones into mass media-related products such as
6 interactive radio and participatory voting at television and concert events and, most recently,
7 into services that enable cell phones to function as credit cards. Unchecked, Defendant's
8 practices will injure an ever-increasing number of unwitting consumers, inflicting damages
9 of an untold magnitude.

10 11. Unlike transactions made using checks and credit cards, which require a
11 signature or a highly private sixteen-digit credit card number, the only thing a mobile content
12 provider needs to charge a consumer for its products is the consumer's cellular telephone
13 number. Once a mobile content provider has a consumer's cell phone number, it can cause
14 that consumer to be billed for services and products irrespective of whether the consumer
15 actually agreed to purchase them.

16 12. Armed with only a cell phone number, the mobile content provider can simply
17 provide that number, along with an amount to be charged, to a billing aggregator (such as
18 Motricity). The aggregator, in turn, instructs the relevant cellular carrier to add the charge to
19 the bill associated with that cell phone number. The charge will then appear on the
20 consumer's cell phone bill, often with only minimal, cryptic identifying information.

21 13. Because the protections normally present in consumer transactions -- such as
22 signatures and private credit card numbers -- are absent from this process, the likelihood of
23 false charges increases enormously. And because a substantial part of mobile content "sales"
24 are effected through web sites using misleading, oblique, or inadequately explained
25 "consent" procedures, that likelihood increases by another order of magnitude. Mobile
26 content providers have powerful financial incentives to collect as many cell phone numbers
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28 COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

1 as possible but little incentive to ensure that the owners of those numbers have truly agreed to
2 purchase their goods and services.

3 **Aggregators' Role In the Scheme to Defraud**

4 14. In order to tap into the emerging wireless content marketplace and make
5 content services available to wireless consumers, content providers must first obtain access to
6 wireless carriers' mobile communications networks and frequently do so by "partnering"
7 with aggregators -- intermediary companies such as Motricity that offer content providers (its
8 "content provider partners") direct access to the carriers through existing relationships. This
9 allows content providers to focus on developing and marketing branded content, applications
10 and programs while aggregators manage the complex carrier relationships, distribution,
11 billing and customer service.

12 15. In order to tap into the emerging wireless content marketplace and make
13 content services available to wireless consumers, content providers must first obtain access to
14 wireless carriers' mobile communications networks and frequently do so by "partnering"
15 with aggregators -- intermediary companies such as Motricity that offer content providers (its
16 "content provider partners") direct access to the carriers through existing relationships. This
17 allows content providers to focus on developing and marketing branded content, applications
18 and programs while aggregators manage the complex carrier relationships, distribution,
19 billing and customer service.

20 16. As an aggregator, Motricity operates mobile transaction networks helping
21 companies, develop, deliver, and bill for mobile content services to compatible mobile
22 devices throughout the State of California and the nation.

23 17. By using their end-to-end technology platforms, their relationships with U.S.
24 carriers, and other value-added services, these aggregators have forged a crucial link between
25 the wireless carriers and the mobile content providers. They have enabled the transformation
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1 of wireless into a marketing, content delivery, and collections process, while carving out a
2 profitable role for themselves as very critical middlemen in this rapidly growing industry.

3 18. Motricity has developed a vast distribution system that integrates into the
4 wireless networks of some of the largest wireless carriers nationwide, providing direct
5 connections to numerous mobile operators. As a result, Motricity is able to reach and bill
6 millions of wireless subscribers nationwide.

7 19. While aggregators such as Motricity charge their content provider customers
8 some upfront fees, their revenue is primarily generated through a "revenue share" on
9 transactions for which they bill cell phone subscribers: each time a charge is incurred in
10 connection with the purchase of mobile content services offered by a content provider, the
11 aggregator and/or the content provider cause said charge to be billed directly on the cellular
12 telephone bill of the carrier's customer who currently owns and/or uses the telephone number
13 (claimed to be) associated with said purchase.

14 20. The carrier then bills and collects the charge from its current subscriber,
15 retains about a portion of the proceeds as its "revenue share" and then remits the balance to
16 the aggregator who has direct access to its network, e.g., Motricity, who retains a percentage
17 of the balance in the form of its own "revenue share," and then remits the remainder directly
18 to the mobile content provider (or, in some instances, to another aggregator who then retains
19 a percentage of the balance in the form of its own "revenue share" and then remits the
20 balance to its mobile content provider client).

21 21. Motricity has in California registered thousands of transactions and processed
22 thousands of dollars in transactions over recent years and has profited greatly from its
23 arrangement with its carrier partners, aggregator partners, and content provider partners.

24 22. As Motricity knows, carriers such as AT&T and Verizon routinely process
25 charges for mobile content that have not been authorized by the charged party.
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1 23. Motricity has not only sanctioned this illegal billing, it has promoted it by
2 negotiating and facilitating partnerships between the carriers and the mobile-content
3 providers that contains few if any safeguards to prevent unauthorized charges.

4 24. Indeed, if Defendant wanted to end this illegal billing, it could do so in an
5 instant. All it would have to do to ensure that they are obtaining the consent of the charged
6 party is agree to process a unique "access code" for each customer account, provided by the
7 carrier to the account holder and his/her authorized representatives at the time it is opened,
8 and require that it be produced anytime a third-party attempts to charge the account. If a
9 matching access code is not provided, no charges would be included on the customer's
10 billing statement.

11 25. But instead of implementing such a simple safeguard, Defendant has
12 intentionally created and maintained a system that encourages fraud at every step. Such
13 system constitutes a deliberate and willful scheme to cheat large numbers of people out of
14 small amounts of money.

15 26. Because the amount Defendant is taking is small on an individual basis -- as
16 little as a few dollars to at most several hundreds of dollars per person -- and because of its
17 vast resources, Defendant employs this scheme with the hope and expectation that its illegal
18 conduct will go unpunished.

19 **THE FACTS RELATING TO NAMED PLAINTIFF WALKER**

20 27. In or about 2003, Plaintiff purchased new cell phone service for her personal
21 use from an authorized sales representative of an established wireless carrier.

22 28. On that same day, in exchange for a cellular telephone service plan, Walker
23 agreed to pay her carrier a set fee for a period of about 12 months.

24 29. In or about 2007, Walker's cell phone account was charged by Defendant for
25 unwanted mobile content services in the form of premium text messages.

1 30. At no time did Walker authorize the purchase of these products and services
2 offered by Defendant or anyone else and at no time did Walker consent to Motricity's
3 sending of text messages to her cellular telephone.

4 31. During the relevant time period, Defendant caused Walker to be charged
5 service fees for so-called Premium text messages provided by Defendant.

6 32. At no time did Walker authorize Defendant or anyone else to bill her for these
7 charges and at no time did Defendant verify Walker's purported authorization of these
8 charges.

9 33. Defendant has yet to provide a full refund of the unauthorized charges
10 consisting of the premium text message charges, ordinary text messages, data charges, back
11 interest, implement adequate procedures to ensure that such unauthorized charges would not
12 appear in future billing periods and/or an assurance that such unauthorized charges would not
13 appear in future billing periods.

14 CLASS ALLEGATIONS

15 34. Plaintiff bring this action, pursuant to Code of Civil Procedure § 382 on behalf
16 of herself and a class, defined as follows: The "Class": a class consisting of all wireless
17 telephone subscribers in California who suffered losses or damages as a result of incurring
18 charges on their cellular telephone bills from or on behalf of Motricity not authorized by the
19 subscriber; provided, however, that the following are excluded from this proposed Class: (i)
20 the defendants, and (ii) any employee of a defendant.

21 35. The Class consists of thousands of individuals and other entities, making
22 joinder impractical, in satisfaction of Code of Civil Procedure § 382.

23 36. The claims of Plaintiff are typical of the claims of all of the other members of
24 the Class.

25 37. Plaintiff will fairly and adequately represent and protect the interests of the
26 other members of the classes. Plaintiff has retained counsel with substantial experience in
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1 prosecuting complex litigation and class actions. Plaintiff and their counsel are committed to
2 vigorously prosecuting this action on behalf of the members of the classes, and have the
3 financial resources to do so. Neither Plaintiff nor their counsel has any interest adverse to
4 those of the other members of the Class.

5 38. Absent a class action, most members of the Class would find the cost of
6 litigating their claims to be prohibitive, and will have no effective remedy. The class
7 treatment of common questions of law and fact is also superior to multiple individual actions
8 or piecemeal litigation in that it conserves the resources of the courts and the litigants, and
9 promotes consistency and efficiency of adjudication.

10 39. Defendant has acted and failed to act on grounds generally applicable to the
11 Plaintiff and the other members of the respective classes, requiring the Court's imposition of
12 uniform relief to ensure compatible standards of conduct toward the members of the Class.

13 40. The factual and legal bases of Defendant's liability to Plaintiff and to the other
14 members of the Class are the same, resulting in injury to the Plaintiff and to all of the other
15 members of the Class. Plaintiff and the other members of the Class have all suffered harm
16 and damages as a result of Defendant's unlawful and wrongful conduct.

17 41. There are many questions of law and fact common to the claims of Plaintiff
18 and the other members of the Class, and those questions predominate over any questions that
19 may affect individual members of the Class. Common questions for the Class include but are
20 not limited to the following:

21 (a) Whether Motricity has unjustly received money belonging to Plaintiff
22 and the Class and whether under principles of equity and good conscience, Motricity
23 should not be permitted to retain it.

24 (b) Whether Motricity tortiously interfered with contracts between
25 Plaintiff and the Class, on the one hand, and their wireless carriers, on the other hand,
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1 by causing them to be charged for products and services by their carrier that were
2 unauthorized.

3 (c) Whether Defendant's conduct described herein violates California
4 Business and Professions Code sections 17200, *et seq.*

5 (d) Whether Defendant's conduct described herein violates California
6 Consumer Legal Remedies Act ("CLRA").

7 (e) Whether Defendant's conduct described herein violates California
8 California's Computer Crime Law, Cal. Pen. Code § 502.

9 (f) Whether Defendant's actions warrant an accounting.

10 (g) Whether Defendant's actions amount to a trespass to chattels.

11 **FIRST CAUSE OF ACTION**

12 (Restitution/Unjust Enrichment on behalf of the Class)

13 42. Plaintiff incorporates by reference the foregoing allegations.

14 43. A benefit has been conferred upon Motricity by Plaintiff and the Class.

15 Motricity has received and retain money belonging to Plaintiff and the Class resulting from
16 their billing and collecting significant amounts of money in unauthorized mobile content
17 charges.

18 44. Motricity appreciates or has knowledge of said benefit.

19 45. Under principles of equity and good conscience, Motricity should not be
20 permitted to retain the money belonging to Plaintiff and the Class which Motricity has
21 unjustly received as a result of its actions.

22 46. Plaintiff and the Class have suffered loss as a direct result of Defendant's
23 conduct.

24 **SECOND CAUSE OF ACTION**

(Tortious Interference with a Contract on behalf of the Class)

25 47. Plaintiff incorporates by reference the foregoing allegations.

26 48. Plaintiff and the Class had contractual relationships with their wireless carriers
27 whereby they agreed to pay a certain sum of money in exchange for activation of their

1 cellular telephone accounts and their carriers' promise to provide various communication and
 2 related services to Plaintiff and the Class and to bill Plaintiff and the Class only for products
 3 or services the purchase of which they had authorized.

4 49. Motricity knew of said contractual relationships and intended to and did
 5 induce a breach or disruption of the contractual relationships.

6 50. Motricity intentionally interfered with said contractual relationship through
 7 improper motives and/or means by knowingly and/or recklessly continually causing to be
 8 placed on the cellular telephone bills of cellular telephone owners across the nation
 9 unauthorized charges.

10 51. Plaintiff and the Class suffered loss as a direct result of the conduct of
 11 Motricity.

12 **THIRD CAUSE OF ACTION**

13 **(Violation of the California Consumer Legal Remedies Act ("CLRA"),**
 14 **Cal. Civ. Code § 1770 on behalf of the Class)**

15 52. Plaintiff incorporates by reference the foregoing allegations.

16 53. The mobile content services that are the subject of this complaint are services
 17 for other than a commercial or business use, as described in Cal. Civ. Code § 1761(b). The
 18 mobile content services are used for personal, family, or household purposes, and mobile
 19 content service subscribers are consumers under the definition in Cal. Civ. Code § 1761(d).
 20 Plaintiff and the other class members use the wireless services for personal, family, or
 21 household purposes, and are consumers under the definition in Cal. Civ. Code § 1761(d).

22 54. As an aggregator, Motricity misrepresents the approval for, characteristics of,
 23 and the obligations associated with the mobile content services when they communicate to
 24 the carriers that Plaintiff and the other class members have consented the mobile content
 25 services and approved the charges for those services. These communications to the carriers to
 26 charge Plaintiff and the other class members for mobile content services, and violate Cal.
 27 Civ. Code § 1770(a)(2), (5), (14).

28 **COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF**

1 55. Collectively, these CLRA violations have damaged the Plaintiff and other
 2 class members by causing them to pay falsely inflated cellular service bills as well as the lost
 3 time required to sort, read, discard and attempt to prevent future charges for unwanted mobile
 4 content services, and lost storage space, connectivity, and computing resources on the
 5 cellular phones.

6 56. Plaintiff, on her own behalf and behalf of the other class members, seeks an
 7 order enjoining Defendant's collective CLRA violations alleged herein, restitution of
 8 property gained by the CLRA violations, and court costs and attorney's fees under the CLRA
 9 (Cal. Civ. Code § 1780(d)).

10 **FOURTH CAUSE OF ACTION**

11 (Violation of California's Unfair Competition Law ("UCL"),
 12 Cal. Bus. & Prof. Code § 17200 on behalf of the Class)

13 57. Plaintiff incorporates by reference the foregoing allegations.

14 58. Motricity's communications to wireless carriers falsely state that Plaintiff and
 15 the other class members have approved, authorized, and/or consented to charges for mobile
 16 content services, and are deceptive and unfair. Further, these communications are unlawful
 17 because they violate the CLRA, CFAA, and the FCA.

18 59. The acts alleged above are unlawful, unfair or fraudulent business acts or
 19 practices and constitute unfair competition under Cal. Bus. & Prof. Code § 17200.

20 60. Collectively, these UCL violations have damaged the Plaintiff and other class
 21 members by causing them to pay falsely inflated cellular service bills, as well as the lost time
 22 required to sort, read, discard and attempt to prevent future charges for unwanted mobile
 23 content services, and lost storage space, connectivity, and computing resources on the
 24 cellular phones.

25 61. Plaintiff, on her own behalf and behalf of the other class members, seeks an
 26 order enjoining Defendant's unfair competition alleged herein, and restitution of property
 27
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1 gained by such unfair competition under the UCL (Cal. Bus. & Prof. Code § 17203), as well
2 as interest and attorney's fees and costs pursuant to, in part, Cal. Code Civ. Proc. § 1021.5.

3 **FIFTH CAUSE OF ACTION**
4 **(Violation of California's Computer Crime Law, Cal. Pen. Code § 502**
5 **on behalf of the Class)**

6 62. Plaintiff incorporates by reference the foregoing allegations.

7 63. The cellular phones owned by Plaintiff and the other class members are
8 sophisticated electronic devices which are programmable and capable of being used in
9 conjunction with external files, and contain many (if not most) of the same capabilities and
10 equipment as traditional desktop computers (as well as cellular radio signal processing
11 technology). These cellular phones are computer systems under the definition of Cal. Pen.
12 Code § 502(b)(5). Likewise, the mobile content alleged in this Complaint is data under the
13 definition of Cal. Pen. Code § 502(b)(6).

14 64. The delivery of mobile content to cellular phones is only possible through the
15 Defendant's access to the cellular phones of Plaintiff and the other class members. When the
16 cellular phones owned by Plaintiff and other class members receive mobile content, it
17 consumes computer services as defined Cal. Pen. Code § 502(b)(4), including computer time,
18 data processing, and storage capacity. Moreover, Plaintiff and the other class members'
19 cellular service will be terminated unless they pay additional fees for the receipt of the
20 unauthorized mobile content, whether they authorized that mobile content or not.

21 65. Through the conduct alleged above, Defendant participates in and/or
22 facilitates the transmission of mobile content to the cellular phones owned by Plaintiff and
23 the other class members. Through this conduct, Defendant violates Cal. Pen. Code §
24 502(c)(3) by knowingly and without permission using or causing to be used computer
25 services and violate Cal. Pen. Code § 502(c)(4) by knowingly accessing the cellular phones
26 of Plaintiff and the class members and adding data to those phones, without permission.
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COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

1 66. Plaintiff and the other class members are damaged by those violations.
 2 Defendant's violations of Cal. Pen. Code § 502 cause the Plaintiff and the other class
 3 members to pay charges for mobile content services to which they did not consent.
 4 Defendant's violation of Cal. Pen. Code § 502 further damages Plaintiff and other class
 5 members by causing them to pay falsely inflated cellular service bills to the Defendant, as
 6 well as the lost time required to sort, read, discard and attempt to prevent future charges for
 7 unwanted mobile content services, and lost storage space, connectivity, and computing
 8 resources on the cellular phones.

9 67. Plaintiff, on her own behalf and behalf of the other class members, seeks
 10 compensatory damages in an amount to be determined at trial and injunctive relief or other
 11 equitable relief (including an accounting, and disgorgement of fees obtained while these
 12 violations were ongoing), as well as reasonable attorney's fees, against Defendant under Cal.
 13 Pen. Code § 502(e).

14 **SIXTH CAUSE OF ACTION**
 15 **(An Accounting on behalf of the Class)**

16 68. Plaintiff incorporates by reference the foregoing allegations.

17 69. The accounts at issue are so complicated that an ordinary recourse demanding
 18 a fixed sum is impracticable.

19 70. The balance owed by the Defendant to the Plaintiff and the other members of
 20 the Class can be ascertained through a proper accounting.

21 71. Plaintiff therefore seeks an accounting from Defendant of the monies owed to
 22 the Plaintiff and the other members of the Class for aforementioned conduct.

23 **SEVENTH CAUSE OF ACTION**
 24 **(Trespass to Chattels on behalf of the Class)**

25 72. Plaintiff incorporates by reference the foregoing allegations.

26 73. At all relevant times, Defendant and/or its agents intentionally and without
 27 consent, gained access to Plaintiff's wireless handset and the handsets of the class, used
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1 Plaintiff's wireless handset and the handsets of the class, occupied memory of these handsets,
2 and/or dispossessed Plaintiff and the members of class of unencumbered access to their
3 wireless handsets.

4 74. In so doing, Defendant intentionally intermeddled with, damaged, and
5 deprived Plaintiff and the class of their wireless handsets, or a portion thereof.

6 75. Under principles of equity and good conscience, Defendant should not be
7 permitted to so interfere with Plaintiff and the Class's possession and use of their wireless
8 handsets.

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiff Palma Walker, on behalf of herself and the Class, prays for
11 the following relief:

- 12 a) Certify this case as a class action on behalf of the Class defined above
13 and appoint Palma Walker as Class Representative, and appoint
14 KamberEdelson, LLC, as lead counsel;
- 15 b) Declare that the actions of Motricity, as set out above, constitute unjust
16 enrichment, warrant an accounting, tortious interference with a contract,
17 trespass to chattels, and violate the CLRA and UCL;
- 18 c) Enter judgment against Defendant for all economic, monetary, actual,
19 consequential, and compensatory damages caused by Defendant's conduct,
20 and if its conduct is proved willful award Plaintiff and the Class exemplary
21 damages (for the sake of clarity, Plaintiff explicitly disclaims any claim for
22 damages under the CLRA at this time);
- 23 d) Award Plaintiff and the Class reasonable costs and attorneys' fees;
- 24 e) Award Plaintiff and the Class pre- and post-judgment interest;
- 25 h) Enter judgment for injunctive and/or declaratory relief as is necessary
26 to protect the interests of Plaintiff and the Class; and
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1 i) Award such other and further relief as equity and justice may require.

2 **JURY DEMAND**

3 Plaintiff request trial by jury of all claims that can be so tried.

4 Respectfully submitted,

5 Dated: July 3, 2008

KAMBEREDELSON, LLC

6
7
8 By: 

9 ALAN HIMMELFARB
10 One of the Attorneys for CAMELLIA
11 WALKER, individually and on behalf of
12 classes of similarly situated individuals.

13 ALAN HIMMELFARB
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15 2757 Leonis Boulevard
16 Vernon, California 90058
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18 JAY EDELSON (pending PRO HAC VICE)
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24 Fax: (312) 873-4610
25
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COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

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8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10 AT SAN FRANCISCO

11 CAMELLIA WALKER, individually and on
12 behalf of a class of similarly situated individuals,

13 Plaintiff,

14 vs.

15 MOTRICITY, INC., a Delaware corporation,

16 Defendant.
17
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Case No. _____

**DECLARATION OF STEPHEN
LEONARD**

19
20 I, Stephen Leonard, hereby declare as follows:

- 21 1. I make this declaration from my personal knowledge and for use in this case.
- 22 2. I am the General Manager, Off Deck, for Motricity, Inc. ("Motricity") and have
23 served in this capacity for over two and one half years. I have extensive knowledge of revenues
24 generated by Motricity as a result of the delivery of premium mobile content to mobile
25 subscribers.
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**DECLARATION OF STEPHEN
LEONARD**

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 08-CV-22131-USDJ Graham/USMJ Torres

DENEE VANDYKE and BEN WALKER,)
individually and on behalf of a class of)
similarly situated individuals,)
)
Plaintiffs,)
)
v.)
)
MEDIA BREAKAWAY LLC, a Nevada limited)
liability company,)
)
Defendant.)

DECLARATION OF JAY EDELSON

Pursuant to 28 U.S.C. § 1764, I, Jay Edelson, hereby declare and state as follows:

1. I am an attorney admitted to practice in the State of Illinois, as well as the United States District Courts for the Northern District of Illinois and the Western District of Michigan, and have appeared in this case *pro hac vice*. I represent the Plaintiffs in the above-titled action. I am entering this declaration in support of the attached Motion and Memorandum for Preliminary Approval of Class Action Settlement. I am over the age of eighteen and am fully competent to make this declaration. This declaration is based upon my personal knowledge, except where expressly noted otherwise.
2. I am one of the managing partners in the law firm of KamberEdelson, LLC.
3. Beginning in 2005, my law firm and its predecessor have been involved in a wide-ranging investigation into the mobile content industry, along with a team of other attorneys prosecuting similar actions.
4. To date, that investigation has resulted in information gathered from over 1,000 aggrieved consumers. As a result, consumers have filed lawsuits across the country against all the major wireless carriers (e.g. AT&T, Sprint, and T-Mobile), aggregators (e.g. mBlox, Motricity, and Mobile Messenger) and mobile content providers (e.g. Media

Breakaway) broadly challenging widespread cramming throughout the mobile content industry.

5. Class Counsel's investigation has also lead to an exchange of information and litigation strategy with multiple governmental agencies, including the Florida Attorney General's Office and the California Public Utilities Commission.
6. I have received and reviewed numerous documents produced from numerous state agencies, including the Illinois, Maryland, and Florida Attorney Generals' Offices.
7. I have also participated in in-person meetings with both the Florida Attorney General's Office and the California Public Utilities Commission to discuss their respective investigations into the mobile content industry. With respect to the Florida Attorney General's Office, Class Counsel had numerous discussions regarding Media Breakaway's billing practices.
8. On December 2, 2009, Class Counsel met in person with Media Breakaway's Counsel in Miami, Florida. The Parties were unable to reach a settlement on that date, but agreed to revisit the issues at a later time.
9. Thereafter, the parties continuously engaged in settlement discussions, which, on January 12, 2009, culminated in the execution of a memorandum of understanding ("MOU"). As set forth in the MOU, the parties reached an agreement in principal as to all relief due to the class. The only remaining issues that required resolution were the amount of attorneys' fees to be paid to Class Counsel and incentive awards to be paid to the Class Representatives. Under the MOU, the Parties agreed to refer such disputes to binding mediation presided over by Mediator Rodney A. Max of Upchurch Watson White & Max Mediation Group.
10. On February 5, 2009, the parties engaged in a mediation to resolve the issues of attorneys' fees and incentive awards. Mediator Rodney A. Max presided over the mediation. Although the Parties were unable to reach agreement on the amount of attorneys' fees to be paid to Class Counsel or incentive awards to be paid to the Class

Representatives, they were able to reach agreement on other matters, as well as a framework to resolve any outstanding issues. The Parties also agreed that Class Counsel's fee award will not exceed \$2.3 million.

11. Based upon information that Class Counsel has collected in this and the Related Action, and from experts, governmental agencies, and in litigation involving the aggregators and wireless carriers, Class Counsel estimates that approximately 20% of all mobile content charges are unauthorized. Based on Class Counsel's investigation in this case and through discovery, this percentage was adjusted to reflect an estimation of Media Breakaway's unauthorized charges as compared to the industry more generally. In determining the cap amount, Class Counsel took into account other factors such as previous refunds given, the results of an investigation from the Office of the Florida Attorney General, and the complaints received from consumers.
12. Based upon the foregoing, Class Counsel believes the \$5.75 million settlement cap approximates the full amount of unauthorized charges attributable to Media Breakaway. Because the unauthorized charges typically range from \$10-\$20, the class now has the opportunity to recover the majority of unauthorized charges.
13. As part of the prospective relief secured on behalf of the class, Media Breakaway has agreed to continue and enhance its refund policy and to allow all wireless subscribers who contact customer service to unsubscribe from any unwanted mobile content subscription. In addition, Media Breakaway has agreed to adhere to U.S. federal laws and rules and applicable state regulatory rules concerning the advertising and sale of Mobile Content subscription services and prevailing mobile best practices such as the Consumer Best Practices Guidelines promulgated by the Mobile Marketing Association.
14. The Parties reached the instant settlement after hard-fought litigation, and based upon the information produced by Media Breakaway in discovery, and otherwise, Plaintiffs' counsel is confident in the strength of the claims alleged in the Class Action Complaint and that Plaintiffs would ultimately prevail at trial. Notwithstanding the foregoing, when

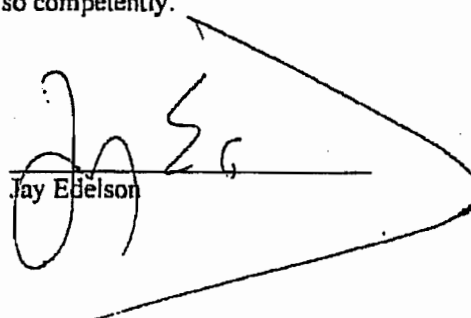
the strengths of the Plaintiffs' claims are weighed against the uncertainty inherent in litigation, the legal and factual obstacles present, and the complexity of class action practice, I believe this settlement to be fair and in the best interest of the class.

15. The present suit has been pending since June 10, 2008, and as a result of the coordinated proceedings involving MB, the wireless service providers, aggregators, and other content providers, Class Counsel had ample foundation upon which to evaluate the proposed settlement. The numerous pending class actions involving alleged unauthorized charges for mobile content have allowed the parties to conduct extensive investigations into the relevant facts and law and to test certain issues through motion practice. Each party, therefore, had the necessary information to evaluate the strengths and weaknesses of their cases in order to mediate effectively. The parties were able to reach the present settlement only after motion practice, discovery, in-person settlement discussions, mediation, and negotiations over settlement terms and language.

16. A true and accurate copy of the firm resume of KamberEdelson LLC is attached to Plaintiff's Motion for Preliminary Approval of the Class Action Settlement as Exhibit B(1).

17. If called on to testify, I could and would do so competently.

18. Further affiant sayeth not.


Jay Edelson

Dated this 13th day of February 2009.

Exhibit B-1

KAMBEREDELSON, LLC FIRM RESUME

KAMBEREDELSON, LLC is a commercial litigation and legal consulting firm with attorneys in Chicago, New York, Los Angeles, and Florida. The firm has four primary practice groups: plaintiffs' class action litigation (with a particular emphasis on technology cases), class action litigation defense, general commercial litigation, and legal consulting.

Our attorneys have been recognized as leaders in these fields by state and federal legislatures, national and international media groups, the courts and our peers. Our reputation for leadership in class action litigation has led state and federal courts to appoint us lead counsel in many high-profile class action suits, including the 2007 contaminated pet food recall, the recent Thomas the Tank Engine lead paint class actions, the AT&T mobile content class actions, and the Sony CD technology multi-district litigation. We have testified before the United States Senate on class action issues and have repeatedly been asked to work on federal and state legislation involving cellular telephony and other issues. Our attorneys have appeared on dozens of national and international television and radio programs to discuss our cases and class action and consumer protection issues more generally. Our attorneys speak regularly at seminars on consumer protection and class action issues, lecture on class actions at law schools and are asked to serve as testifying experts in cases involving class action and consumer issues.

PLAINTIFFS' CLASS AND MASS ACTION PRACTICE GROUP

KAMBEREDELSON is a leader in plaintiffs' class and mass action litigation, with a particular emphasis on technology class actions. We have several sub-specialties within our plaintiffs' class and mass action practice group:

Technology Consumer Protection Class Actions: We have settled the only class actions to date alleging text message spam under the Telephone Consumer Protection Act, including a \$7,000,000 settlement with Timberland Co. We have prosecuted over 100 cases involving mobile content, settling numerous nationwide class actions, including against industry leader AT&T Mobility, and an injunctive settlement against Facebook, Inc. Our attorneys also settled an international class action against Register.com, which alleged that the company engaged in deceptive practices in placing advertising on "coming soon" pages of newly registered domain names.

Representative Settlements:

- *Shen v. Distributive Networks LLC*, No. 06 C 4403 (N.D. Ill.): Co-lead counsel in a class action alleging that defendant violated federal law by sending unsolicited text messages to the cellular telephones of consumers nationwide. The settlement – the first of its kind in the country – provided each class member with up to \$150 in cash.
- *Weinstein, et al. v. Airt2me, Inc.*, Case No. 06 C 0484 (N.D. Ill): Co-lead counsel in class action alleging that defendants violated federal law by sending unsolicited text messages to cellular telephones of consumers.

Case settled for \$7,000,000.

- *McFerren v. AT&T Mobility, LLC*, No. 08-CV-151322 (Fulton County Sup. Ct., GA): Lead counsel in class action settlement involving 16 related cases against largest wireless service provider in the nation. Settlement provided virtually full refunds to a nationwide class of consumers who alleged that unauthorized charges for mobile content were placed on their cell phone bills.
- *Gray v. Mobile Messenger Americas, Inc.*, No. 08-CV-61089 (S.D. Fla.): Lead counsel in case alleging unauthorized charges were placed on cell phone bills. Case settled for \$12,000,000.
- *Gresham v. Cellco Partnership*, No. BC 387729 (Los Angeles Sup. Ct.): Lead counsel in case alleging unauthorized charges were placed on cell phone bills. Settlement provided class members with full refunds.
- *Duffy v. Nevis Mobile, LLC*, No. 08 CH 21376 (Cir. Ct. Cook County, IL): Class counsel in certified class action against mobile content provider for unauthorized mobile content charges resulting in default judgment over \$10,000,000.
- *Abrams v. Facebook, Inc.*, No. 07-05378 (N.D. Cal.): Lead counsel in non-class action settlement concerning the transmission of allegedly unauthorized mobile content.
- *Zurakov v. Register.com*, No. 01-600703 (New York County, NY): Co-lead counsel in a class action brought on behalf of an international class of over one million members against Register.com for its deceptive practices in registering Internet domain names. Settlement required Register.com to fully disclose its practices and provided the class with relief valued in excess of \$17,000,000.
- *Kiesel v. Time Warner*, No. 809542 (Orange County Sup. Ct., CA): Co-lead counsel in a representative action on behalf of thousands of apartment and condominium residents in which firewalls were breached during cable installation. Settlement provided the class with complete relief including the inspection of every multi-unit dwelling in the affected county and repair of all breached units wherever they were found.
- *Weaver v. WebTV*, No. 793551 (Santa Clara Sup. Ct., CA): Co-lead counsel in a certified nationwide consumer class action alleging consumer fraud/deceptive advertising of computer services and capabilities. The settlement provided the class with a collective award guaranteeing a minimum face value of \$6,000,000.

Products Liability Class Actions: We have been appointed lead counsel in state and federal products liability class settlements, including a \$30,000,000 settlement resolving the "Thomas the Tank Engine" lead paint recall cases, a \$32,000,000

settlement involving the largest pet food recall in the history of the United States and Canada, and a \$100,000,000 settlement involving Starlink Corn Products.

Representative Settlements:

- *Barrett v. RC2 Corp.*, No. 07 CH 20924 (Cir. Ct. Cook County, IL): Co-lead counsel in lead paint recall case involving Thomas the Tank toy trains. Settlement is valued at over \$30,000,000 and provides class with full cash refunds and reimbursement of certain costs related to blood testing.
- *In re Pet Foods Product Liability Litigation*, No. 07-2867 (D. N.J.): Co-lead counsel in class action involving largest pet food recall in United States history. Settlement provided \$24,000,000 common fund and \$8,000,000 in charge backs.
- *In re Starlink Corn Products Liability Litigation* (N.D. Ill.): Represented sub-class of farmers who grew recalled Starlink corn in a consolidated settlement of federal class action valued in excess of \$100,000,000.
- *Kan v. Toshiba America Information Systems, Inc.*, No. BC327273 (Los Angeles Sup. Ct.): Class counsel in a defective product/breach of warranty action concerning laptop computers. Settlement provided the class with a collective award valued at approximately \$45,000,000.

General Consumer Protection Class Actions: We have successfully prosecuted countless class action suits against health clubs, dating agencies, phone companies, debt collectors, and other businesses on behalf of consumers.

Representative Settlements:

- *Pulcini v. Bally Total Fitness Corp.*, No. 05 CH 10649 (Cir. Ct. Cook County, IL): Co-lead counsel in four class action lawsuits brought against two health clubs and three debt collection companies. A global settlement provided the class with over \$40,000,000 in benefits, including cash payments, debt relief, and free health club services.
- *Lofton v. Bank of America* (N.D. Cal): Lead counsel in class action alleging deceptive imposition of "fuel-related fees" in connection with airline ticket purchases. Settled for over \$2,000,000 in cash, in addition to other relief.
- *Kozubik v. Capital Fitness, Inc.*, 04 CH 627 (Cir. Ct. Cook County, IL): Co-lead counsel in state-wide suit against a leading health club chain, which settled in 2004, providing the over 150,000 class members with between \$11,000,000 and \$14,000,000 in benefits, consisting of cash refunds, full debt relief, and months of free health club membership.

- *Kim v. Riscuity*, No. 06 C 01585 (N.D. Ill): Co-lead counsel in suit against a debt collection company accused of attempting to collect on illegal contracts. The case settled in 2007, providing the class with full debt relief and return of all money collected.
- *Jones v. TrueLogic Financial Corp.*, No. 05 C 5937 (N.D. Ill): Co-lead counsel in suit against two debt collectors accused of attempting to collect on illegal contracts. The case settled in 2007, providing the class with approximately \$2,000,000 in debt relief.
- *Chancer v. Princess Cruises*, No. BC 115472 (Los Angeles Sup. Ct.): Co-lead counsel in class action lawsuit challenging a cruise line's deceptive "low price guarantee" as a consumer fraud class action. The settlement provided the class with a collective award valued at several millions of dollars.
- *Fertelmeyster v. Match.com*, No. 02 CH 11534 (Cir. Ct. Cook County, IL): Co-lead counsel in a state-wide class action suit brought under Illinois consumer protection statutes. The settlement provided the class with a collective award with a face value in excess of \$3,000,000.
- *Cloe v. Yahoo!, Inc.*, No. 02 CH 21458 (Cir. Ct. Cook County, IL): Co-lead counsel in a state-wide class action suit brought under state consumer protection statutes. The settlement provided the class with a collective award with a face value between \$1,600,000 and \$4,800,000.
- *Cloe v. Lycos*, No. 02 CH 21456 (Cir. Ct. Cook County, IL): Co-lead counsel in a state-wide class action suit settled under state consumer protection statutes.
- *Gavrilovic v. Vintacom Media Group, Inc.*, No. 04 CH 11342 (Cir. Ct. Cook County, IL): Co-lead counsel in a state-wide class action suit settled under state consumer protection statutes.
- *McArthur v. Spring Street Networks*, 100766/2004 (New York County, NY): Co-lead counsel in a nationwide class action suit settled under New York consumer protection statutes.
- *California Reconveyance Cases*: Part of a team of attorneys who settled a series of state court class action cases under California's Reconveyance Statute. Cases settled for a collective amount of over \$10,000,000.

Insurance Class Actions: We have prosecuted and settled multi-million dollar suits against J.C. Penney Life Insurance for allegedly illegally denying life insurance benefits under an unenforceable policy exclusion and against a Wisconsin

insurance company for terminating the health insurance policies of groups of self-insureds.

Representative Settlements:

- *Holloway v. J.C. Penney*, No. 97 C 4555, (N.D. Ill.): One of the primary attorneys in a multi-state class action suit alleging that the defendant illegally denied life insurance benefits to the class. The case settled in or around December of 2000, resulting in a multi-million dollar cash award to the class.
- *Ramlow v. Family Health Plan* (Wisc. Cir. Ct., WI): Co-lead counsel in a class action suit challenging defendant's termination of health insurance to groups of self-insureds. The plaintiff won a temporary injunction, which was sustained on appeal, prohibiting such termination and eventually settled the case ensuring that each class member would remain insured.

Securities Class Actions: We have successfully prosecuted securities class actions against companies such as Command Systems and Loch Harris on behalf of shareholders.

Representative Settlements:

- *Stassi et al. v. Loch Harris et al.*, No. GN 200180 (TX): Lead counsel in derivative action on behalf of technology development company that successfully obtained dissolution of corporation and distribution of assets to shareholders.
- *In re Command Systems*, Case No. 98-cv-3279 (S.D.N.Y.): Lead counsel in securities class action against technology company in which participating shareholders recovered over 80% of their losses.

Privacy Class Actions: We have litigated numerous class actions against Facebook, Sears, TD Ameritrade, and others involving the failure to protect customers' private information, some resulting from actual security breaches.

Representative Settlements:

- *In re Sony BMG CD Technologies*, No. 05-cv-0575 (S.D.N.Y.): Co-lead counsel in case that resulted in settlement correcting risk of harm to computer users caused by Digital Rights Management on music CD's. Settlement included replacement of all affected music CD's and an award of additional music CD's to class members.
- *Wormley v. GeoCities*, No. 196032 (Los Angeles Sup. Ct.): Class Counsel in consumer class action for privacy violations that is believed to be the first Internet privacy case to recover a benefit for impacted class members.

Mass/Class Tort Cases: Our attorneys were part of a team of lawyers representing a group of public housing residents in a suit based upon contamination related injuries, a group of employees exposed to second hand smoke on a riverboat casino, and a class of individuals suing a hospital and national association of blood banks for failure to warn of risks related to blood transfusions.

Representative Cases:

- *Aaron v. Chicago Housing Authority*, 99 L 11738, (Cir. Ct. Cook County, IL): Part of team representing a group of public housing residents bringing suit over contamination-related injuries. Case settled on a mass basis for over \$10,000,000.
- *Sturman v. Rush Presbyterian-St. Luke's Medical Center*, 2000 L 11069 (Cir. Ct. Cook County, IL): Part of team of attorneys in suit against hospital and national association of blood banks alleging failure to warn of risks of hepatitis C infection as a result of past blood transfusions.
- *Januszewski v. Horseshoe Hammond*, No. 2:00CV352JM (N.D. Ind.): Part of team of attorneys in mass suit alleging that defendant riverboat casino caused injuries to its employees arising from exposure to second-hand smoke.

The firm's cases regularly receive attention from local, national, and international media. Our cases and attorneys have been reported in the Chicago Tribune, USA Today, the Wall Street Journal, the New York Times, the LA Times, by the Reuters and UPI news services, and BBC International. Our attorneys have appeared on numerous national television and radio programs, including ABC World News, CNN, Fox News, NPR, and CBS Radio, as well as television and radio programs outside of the United States. We have also been called upon to give congressional testimony and other assistance in hearings involving our cases.

CLASS ACTION DEFENSE PRACTICE GROUP

Our founding attorneys began their careers defending class actions at large national firms. We have successfully handled numerous class actions on behalf of banks, securities firms, and numerous retailers.

GENERAL COMMERCIAL LITIGATION

Our attorneys have handled a wide range of general commercial litigation matters, from partnership and business-to-business disputes, to litigation involving corporate takeovers. We have handled cases involving tens of thousands of dollars to "bet the company" cases involving up to hundreds of millions of dollars. Our attorneys have collectively tried hundreds of cases, as well as scores of arbitrations and mediations. All of our attorneys have regularly practiced in state and federal trial and appellate courts. The firm also has experience advising companies in international matters arbitrated before the ICC, including a multi-billion dollar action against Shell Oil.

LEGAL CONSULTING

Legal consulting is an area of practice that sets KAMBEREDELSON apart from other law firms. The firm advises on governmental and consumer issues and has helped its clients formulate business strategies, revise contractual and advertising material, and implement consumer protection strategies more generally. Our clients range from small Internet start-ups, to brick and mortar companies, to one of the most trafficked Internet marketers, content and commerce firms in the country.

OUR ATTORNEYS

SCOTT A. KAMBER is a founding member of KAMBEREDELSON. Mr. Kamber currently serves as lead or co-lead counsel in numerous major national class actions including *In re Pet Food*, *In re ATI Tech HDCP Litig.*, *Johnson v. Microsoft*, *In re Network Commerce Securities Litig.*, and *In re HP Power Plug and Graphic Card Litig.* Mr. Kamber has also served in leadership roles in private and class actions including suits on behalf of shareholders, consumers and private corporations in the United States and abroad, including: *In re Song BMG CD Technologies* (one of the largest computer virus cases ever resolved), *Wormley v. GeoCities* (consumer class action for privacy violations that is believed to be the first Internet privacy case to recover a benefit for impacted class members); *In re Starlink Growers* (represented sub-class of farmers who grew Starlink in a consolidated settlement of federal class action valued in excess of \$100 million); *In re Loch Harris* (derivative action that successfully obtained dissolution of corporation and distribution of assets to shareholders); *In re Command Systems* (securities class action in which participating shareholders recovered over 80% of their losses); and *In re WebTV* (consumer class action for false advertising).

In addition to these commercial cases, Mr. Kamber has been involved in the efforts of African torture victims to bring their persecutors to justice under the Alien Tort Claims Act and has achieved significant decisions for his clients before the United States Court of Appeals for the Second Circuit and the Southern District of New York. One such result, *Cabiri v. Ghana*, 165 F.3d 193 (1999), is a leading Second Circuit case under the Foreign Sovereign Immunities Act.

Mr. Kamber graduated *cum laude* from University of California, Hastings College of the Law in 1991 where he was Order of the Coil, Articles Editor for Hastings Constitutional Law Quarterly and a member of the Moot Court Board. Mr. Kamber graduated with University and Departmental Honors from The Johns Hopkins University in 1986. Mr. Kamber has extensive courtroom experience and has tried over 15 cases to verdict. Prior to founding Kamber & Associates, LLC, Mr. Kamber represented both plaintiffs and defendants in a wide range of commercial litigation. Mr. Kamber is admitted to practice in the State of New York as well as the United States Supreme Court, the United States Court of Appeals for the Second Circuit and Ninth Circuit, and the United States District Courts for the Southern and Eastern Districts of New York. In addition, Mr. Kamber is well versed in the procedures and practice of numerous arbitration forums, both domestic and international. Prior to practicing law, Mr. Kamber was a financial consultant.

JAY EDELSON is a founding member of KAMBEREDELSON. He has served as lead counsel in over 40 class actions, resulting in hundreds of millions of dollars in relief for his clients. His

class action cases have established precedent concerning the ownership rights of domain name registrants, the applicability of consumer protection statutes to Internet businesses, and the interpretation of numerous life insurance, health insurance, and other state statutes. In February of 2007, the Chicago Sun Times nicknamed Mr. Edelson the "Spam Slammer" after he secured the first settlement of a suit under the Telephone Consumer Protection Act for the alleged transmission of unsolicited text messages. Mr. Edelson has been involved in a number of high-profile "mass tort" class and mass actions and product recall cases, including cases against Menu Foods for selling contaminated pet food, a class action settlement involving the Thomas the Tank toy train recall, and suits involving damages arising from second-hand smoke.

On the defense side, he has successfully represented numerous financial institutions and Internet marketing companies in class action defense, consumer protection issues, and general litigation. He regularly counsels companies on legal compliance issues.

Mr. Edelson is frequently asked to participate in legal seminars and discussions regarding the cases he is prosecuting. He has also appeared on dozens of television and radio programs to discuss his cases. In April of 2007, Mr. Edelson provided testimony to the Subcommittee on Agriculture Appropriations, Senate Committee on Appropriations, U.S. Senate Hearing on "Pet Food Contamination" in connection with one of the class action cases he prosecuted. Mr. Edelson consults with the University of Chicago Medical Center and the Pritzker School of Medicine on Internet and legal ethics issues. He has taught classes on class action law at Northwestern Law School, John Marshall Law School, and DePaul Law School. Mr. Edelson is a graduate of Brandeis University and the University of Michigan Law School.

MYLES MCGUIRE is a partner of KAMBEREDELSON. His practice concentrates, nearly exclusively, on consumer protection law and class actions. Mr. McGuire has taken leadership roles in many nationwide and multi-state class actions. His specific area of emphasis is on "new technology" class actions, including those involving electronic commerce, cellular telephony and wireless media, among others. He has served in leadership positions in groundbreaking settlements involving Facebook, Verizon, Sprint, and T-Mobile. Mr. McGuire has been asked by members of Congress to comment on proposed legislation in the mobile content industry and has worked with state regulatory bodies in related efforts.

Mr. McGuire graduated from Marquette University Law School in 2000 and is admitted to practice in Wisconsin and Illinois. He is a member of the National Association of Consumer Advocates and the Chicago Bar Association. Prior to working as a plaintiffs' attorney, Mr. McGuire spent several years counseling high-tech companies.

MICHAEL MCMORROW is a partner of KamberEdelson. His practice focuses on commercial litigation and class action law. Mr. McMorow is an experienced trial and appellate litigator, and has been a member of the Trial Bar for the Northern District of Illinois since 2005. Mr. McMorow has represented clients in court and at trial across a full spectrum of commercial litigation issues, including trade secret litigation, commercial contracts, airplane leasing, airport construction, automotive manufacturing, commercial and consumer lending, product liability, and has represented clients in heavily-regulated industries including insurance, defense contracting, healthcare and energy. Prior to joining the firm, Mr. McMorow was Senior

Counsel at Foley & Lardner LLP, practicing commercial and energy regulatory litigation.

Mr. McMorrow graduated magna cum laude from the University of Illinois College of Law in 2000, where he was Associate Editor of the University of Illinois Law Review, a Harno Scholarship recipient, and President of the Prisoners' Rights Research Project. Mr. McMorrow received his B.A. in Political Science from Yale University in 1994. Mr. McMorrow has been a member of the Chicago Bar Association Judicial Evaluation Committee since 2003, and his pro bono representations have included asylum applicants and prisoners' rights issues.

STEVEN W. TEPPLER is Senior Counsel to KAMBEREDELSON. Mr. Teppler concentrates his practice on data protection and information technology law, including electronic discovery, loss or destruction of information, authentication and admissibility issues uniquely inherent to computer generated information, including spoliation issues arising from unauthorized or illegal data manipulation or alteration. He is the Co-Vice-Chair of the American Bar Association Information Security Committee as well as the Florida Bar's Professional Ethics Committee.

Mr. Teppler has authored over a dozen articles relating to information technology law and routinely presents his work at conferences. Mr. Teppler's recent publications include: *Spoliation in the Digital Universe*, *The SciTech Lawyer*, Science and Technology Law Section of the American Bar Association, Fall 2007; *Life After Sarbanes-Oxley - The Merger of Information Security and Accountability* (co-author), 45 *Jurimetrics J.* 379 (2005); *Digital Signatures Are Not Enough* (co-author), Information Systems Security Association, January 2006; *State of Connecticut v. Swinton: A Discussion of the Basics of Digital Evidence Admissibility* (co-author), Georgia Bar Newsletter Technology Law Section, Spring 2005; *The Digital Signature Paradox* (co-author), IETF Information Workshop (The West Point Workshop) June 2005; *Observations on Electronic Service of Process in the South Carolina Court System*, e-filing Report, June 2005. Mr. Teppler is also a contributing author to an American Bar Association book with the working title "Foundations of Digital Evidence" (publication expected March 2009).

Mr. Teppler graduated from the Benjamin N. Cordozo School of Law in 1980 after earning his B.A., summa cum laude, from the City College of New York in 1977. Mr. Teppler is admitted to the bars of New York, the District of Columbia and Florida.

DANA B. RUBIN is an associate at KAMBEREDELSON focusing her practice on a wide range of class action issues. She graduated with honors from the University of Maryland, College Park in 1993. She received her J.D. in 1999 from Fordham University School of Law, where she was an Associate Editor on the Intellectual Property, Media & Entertainment Law Journal.

Prior to joining KAMBEREDELSON, Ms. Rubin played a role in numerous private and class actions on behalf of shareholders and consumers. Ms. Rubin has also represented both plaintiffs and defendants in employment litigation and civil rights matters. Ms. Rubin is admitted in the State Courts of New York and the United States District Courts for the Southern and Eastern Districts of New York. She is a member of the New York State Bar Association.

STEVEN LEZELL is an associate at KAMBEREDELSON. Mr. Lezell has litigated a number of consumer protection cases through trial, engaged in extensive motion practice, drafted appellate

briefs, prosecuted class actions and participated in multi-session mediations.

Steven received his J.D. from Chicago-Kent College of Law with High Honors, *Order of Coif*, while earning his certificate in litigation and alternative dispute resolution. During law school, he served as a Judicial Extern for the Honorable Ann C. Williams on the Seventh Circuit Court of Appeals and as President of the Student Bar Association. Mr. Lezell also served as a Notes and Comments Editor for *The Chicago-Kent Law Review* and represented Chicago-Kent at the National Sports Law Moot Court Competition in New Orleans in 2004. Mr. Lezell was awarded the ABA-ALI Scholarship and Leadership Award for best representing the combination of leadership and scholarship in his graduating class and also received the Lowell H. Jacobson Memorial Scholarship, which is awarded competitively to a student from one of the law schools in the Seventh Circuit to recognize personal commitment and achievement.

Mr. Lezell received his B.A. in political science, with Distinction, from the University of Michigan—Ann Arbor in 2002.

RYAN D. ANDREWS is an associate at KAMBEREDELSON. Prior to joining the firm, Mr. Andrews engaged in all aspects of the prosecution and defense of claims on behalf of individual and corporate clients, including motion practice, arbitration, mediation, trial to verdict, and appeals. He has been appointed class counsel in multiple complex high-stakes class actions.

Mr. Andrews received his J.D. with High Honors from the Chicago-Kent College of Law in 2005 and was named *Order of the Coif*. While in law school, Mr. Andrews was a Notes & Comments Editor for *The Chicago-Kent Law Review*, as well as a teaching assistant for both Property Law and Legal Writing courses. Mr. Andrews externed for the Honorable Joan B. Gottschall in the Northern District of Illinois, and earned CALI awards for the highest grade in five classes.

Mr. Andrews graduated from the University of Michigan in 2002 earning his B.A., *with distinction*, in Political Science and Communications.

RAFEY S. BALABANIAN is an associate at KAMBEREDELSON. Prior to joining the firm, Mr. Balabanian was an associate attorney with a boutique Chicago law firm where he practiced commercial litigation. Mr. Balabanian has represented individual and corporate clients ranging from real estate developers, hotels, insurance companies, lenders, shareholders and attorneys. Mr. Balabanian has first chaired both jury and bench trials, engaged in extensive motion practice, litigated class action matters and has acted as lead counsel in several mediations and arbitrations.

Mr. Balabanian received his J.D. from the DePaul University College of Law in 2005. While in law school, Mr. Balabanian received a certificate in international and comparative law and earned the CALI award for the highest grade in advanced trial advocacy. Mr. Balabanian received his B.A. in history, *with distinction*, from the University of Colorado – Boulder in 2002.

MICHAEL J. ASCHENBRENER is an associate at KAMBEREDELSON. Prior to joining the firm, Mr. Aschenbrener was an associate for a large plaintiffs' consumer protection law firm where he prosecuted individual and class actions on behalf of consumers against mortgage companies and debt collectors. Mr. Aschenbrener successfully litigated multiple cases to judgment, securing redress for aggrieved consumers. Mr. Aschenbrener is also a former Assistant Attorney General for the State of Minnesota and a veteran of the telecommunications

and advertising industries.

Mr. Aschenbrener graduated from Chicago-Kent College of Law in 2007. During law school, he was an award-winning member of the Moot Court Honor Society, as well as Editor of the Seventh Circuit Review. He also published an article in a law journal and received a CALI Award for obtaining the highest grade in his Tax Procedure course.

Mr. Aschenbrener received his B.A. in Journalism from the University of Minnesota-Twin Cities in 2001.

ETHAN PRESTON is Of Counsel to KAMBEREDELSON. Mr. Preston focuses on consumer technology, and concentrates his practice in antitrust/competition issues and information security issues. Mr. Preston has taken substantial leadership roles in numerous class action lawsuits. Mr. Preston is admitted to practice before the Northern District of Illinois, the District of New Mexico, and Illinois state courts. (Mr. Preston is an inactive member of the New Mexico state bar.)

Mr. Preston has authored the following law review articles: *Cross-Border Collaboration by Class Counsel in the U.S. and Ontario*, 4 Canadian Class Action Rev. 164 (2007), *The Global Rise of a Duty to Disclose Information Security Breaches*, 22 J. Marshall J. Computer & Info. L. 457 (2004) (with Paul Turner), *Computer Security Publications: Information Economics, Shifting Liability and the First Amendment*, 24 Whittier L. Rev. 71 (2002) (with John Lofton), and *The USA PATRIOT Act: New Adventures in American Extraterritoriality*, 10 J. Fin. Crime 104 (2002). Mr. Preston has also lectured on copyright issues at the University of Illinois at Chicago, and on comparative law on attorneys' fees and costs for the Center for International Legal Studies.

Mr. Preston received his Bachelor of Arts degree with honors from the Plan II honors program at the University of Texas at Austin, and his J.D. with distinction from the Georgetown University Law Center in 2001.

ALAN HIMMELFARB is Of Counsel to KAMBEREDELSON. Mr. Himmelfarb was admitted to the practice of law in California in July 1979. At that time, at the age of 23, he was the youngest member of the California Bar. Within five years, he became managing attorney of a law firm employing six attorneys and a support staff of ten. He specialized in complex litigation, contracts, high-technology, foreign licensing, and foreign technology transfers, and practiced before both state and federal courts. In 1988, he took a position overseas as a foreign legal consultant in Asia. In this capacity, he acted as chief negotiator for international sales/service/technical transfer agreements, mediated cross-cultural (Asian-Western) business and governmental interests, evaluated international business/marketing strategies for multinational corporations, drafted and negotiated a full range of international transactional agreements for Korean, European and American corporations and businessmen and marketed legal services to Korean domestic market and international community.

In 1992, Mr. Himmelfarb returned to Los Angeles in the capacity of a litigator, with an emphasis on plaintiffs' work against banks and other financial institutions. He has been engaged in class action litigation since 1994.

DAVE STAMPLEY is Of Counsel to KAMBEREDELSON, where his practice focuses on technology law, particularly the litigation of issues affecting the privacy and security of consumers' personal information. As an assistant attorney general for New York, Mr. Stampley led aggressive Internet Bureau enforcement actions recognized for producing meaningful privacy protections and corporate security standards. He handled New York and multistate cases involving DoubleClick, Ziff Davis Media, Eli Lilly (prozac.com), and AOL/Netscape (SmartDownload).

Prior to joining KAMBEREDELSON, Mr. Stampley was general counsel and compliance specialist at Neohapsis, a provider of information risk management, security consulting, and lab testing services. He previously served as director of privacy for Reynolds & Reynolds, a global Fortune 1000 technology solutions provider.

In addition to Mr. Stampley's technology law and corporate compliance expertise, he gained extensive trial experience as an assistant district attorney in the premier public prosecutor's office, the Manhattan D.A.'s office (New York County). His 30 trials included serving as co-counsel in the case against Edward Leary, the "Manhattan Subway Bomber."

Mr. Stampley is a Certified Information Privacy Professional and a faculty member of the Institute for Applied Network Security. He frequently speaks at conferences on security and privacy compliance issues and has been a guest lecturer at the New York University Stern School of Business and DePaul University's Graduate Information Technology Studies. He served as an invited expert on the Platform for Privacy Preferences (P3P) Vocabulary Working Group of the WorldWide Web Consortium (W3C). Mr. Stampley clerked for the Honorable Lenore L. Prather of the Supreme Court of Mississippi and is a former business applications programmer and systems analyst.

Mr. Stampley is a graduate of the University of Virginia School of Law, where he was a Dillard Fellow, and Mississippi State University.